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In The

Supreme Court of the United States

Number 310.

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

RESPONDENT MATTSON'S ANSWER TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN ANSWER TO THE GRANTING OF THE WRIT.

WILLIAM L. WALKER,
MAX G. TOWLE,
ROBERT A. NELSON,
Counsel for Respondent,
C. Russell Mattson.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

ANSWER TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

This court has no jurisdiction in this cause under Title 28, United States Code, Section 1254 and Rule

38, Subsection 5 (b) of Revised Rules of the Supreme Court of the United States.

There are no questions presented by the petition for writ of certiorari which can command a favorable ruling from this court, because all questions were properly and correctly answered by the United States Court of Appeals as follows:

1. That plaintiff's action should have been submitted to the jury, because, generally, question of negligence is one of fact.

2. Action for death which occurred in Nebraska was governed by substantive law of Nebraska.

3. Considered dictum of state court of last resort should not be ignored when a federal court is attempting to construe or ascertain the meaning of the local law.

4. Public utility distributing natural gas for public use must exercise every reasonable precaution to avoid injury or death by escape of gas while it is being carried through its pipes to the consumer, and the care required must be commensurate with danger which it is the utility's duty to avoid.

5. Public utility distributing natural gas for public use must not only install pipes and fittings of good material and workmanship but must see that equipment when installed and laid is maintained in a reasonably safe condition.

6. The foundation of liability for negligence is knowledge, but in law an opportunity by exercise of

reasonable diligence to acquire knowledge is equivalent to knowledge.

7. One under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance.

8. Janitor of school being served by natural gas company was member of public entitled to protection of rule requiring utility to exercise degree of care commensurate with danger involved.

9. Where public utility, at expense of school district, installed gas service line connected with utility's gas line and extending from street to school building, utility asserted exclusive right to make repairs on service pipe and undertook inspections, the utility had duty to exercise proper care and skill in making inspections, and whether it had done so was for jury in action for death of school janitor fatally injured by explosion caused by natural gas escaping from the service line.

10. Under Nebraska law, service pipe line from gas line to consumer's building where meter was located was part of utility's system, and fact that materials and labor going into construction were paid for by consumer was immaterial as between utility and member of public injured by explosion of gas which escaped from the service line.

11. Where federal district judge was in error in concluding that there were no pronouncements by state supreme court, either directly or in considered dictum, indicating views of that court on question of local law, federal court was not at liberty to substitute its

independent judgment, uninfluenced by adjudications of the state supreme court.

12. Under Nebraska law, public utility distributing natural gas could not delegate duty it owed to public to exercise proper care to maintain gas system in safe condition, but had continuing duty to exercise proper care to prevent injury from escaping gas.

13. Where gas in service pipe leading from gas line to consumer's premises belonged to public utility, the utility was under duty of using proper care to protect public from injury caused by dangerous propensities of gas in the service pipe.

14. Agents of public utility distributing natural gas knew or were presumed to know probable life or durability of material used in construction of service pipe from pipe line to consumer's building, and where pipes had been in use for approximately 27 years before explosion caused by gas escaping from a service pipe, jury might reasonably find that utility was charged with notice of defective condition of pipe.

15. Generally, the question of negligence is one of fact.

The reasons why this writ should not be granted are:

1. The United States Supreme Court ordinarily accepts the determination of local law by the United States Court of Appeals.

Ragan v. *Merchant's Transfer & Warehouse Co.*, 93 L. Ed. 1248, 170 Fed. (2d) 44.

Proper v. *Clark*, 93 L. Ed. 1206.

Busby v. *Electric Utilities Employees Union,* 323 U. S. 72, 89 L. Ed. 78, 65 S. Ct. 142.

Huddleston v. *Dwyer,* 322 U. S. 232, 237, 88 L. Ed. 1246, 64 S. Ct. 1015.

MacGregor v. *State Mutual Life Assur. Co.,* 315 U. S. 280, 86 L. Ed. 846, 62 S. Ct. 607.

Klaxon Co. v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020.

Palmer v. *Hoffman,* 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477.

In re Woods, 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417, 418.

2. As to questions controlled by state law, conflict among United States Courts of Appeals is not of itself a reason for granting a writ of certiorari by the Supreme Court of United States, as the conflict may be merely corollary to a permissible difference of opinion in the State Courts.

Ruhlin v. *New York Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860.

3. The United States Supreme Court will grant a writ of certiorari to a United States Court of Appeals involving application of local law only when such court has failed to apply the local law.

Erie R. Co. v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

4. The United States Supreme Court will not grant a writ of certiorari for sole purpose of reviewing the evidence and proper application of local law.

Erie R. Co. v. *Thompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; and all other authorities cited in 1 above.

5. The United States Court of Appeals correctly and properly determined the substantive law of Nebraska on the subject involved, by applying, considered dicta and persuasive data, such as compelling inferences and logical implications and other related adjudications and considered pronouncements by the Supreme Court of Nebraska on duties of inspection, supervision, maintenance and repair of a gas utility, gas service lines and liability for its violation and noncompliance with the law and neglect to perform the duty.

Erie R. Co. v. *Thompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

Badger v. *Hoidale*, 8 Cir., 88 Fed. (2d) 208, 211, 109 A. L. R. 798.

Yoder v. *Nu-Enamel Corp.*, 8 Cir., 117 Fed. (2d) 488.

Hawks v. *Hamil*, 288 U. S. 52, 77 L. Ed. 610, 53 S. Ct. 240.

6. The United States Court of Appeals, correctly and accurately ascertained the law of Nebraska and gave complete consideration to:

Fonda v. *Northwestern Public Service Co.*, 134 Neb. 430, 278 N. W. 836.

Fonda v. *Northwestern Public Service Co.*, 138 Neb. 262, 292 N. W. 712.

Tarkington v. *Northwestern Public Service Co.*, 138 Neb. 278, 292 N. W. 720.

Clough v. *North Central Gas Co.*, 150 Neb. 418, 34 N. W. (2d) 862.

Harms v. *City of Beatrice*, 142 Neb. 219, 5 N. W. (2d) 287, 142 A. L. R. 239.

and did not base its decision on chance, or immaterial or irrelevant expressions but applied considered dicta, persuasive data such as compelling inferences and logical implications and other related adjudications and considered pronouncements by the Supreme Court of Nebraska some of which were taken from the cases cited with approval therein, including,

Julian v. *Sinclair Oil & Gas Co.*, 168 Okla. 192, 32 P. (2d) 31;

Manning v. *St. Paul Gas Light Company*, 129 Minn. 55, 151 N. W. 423, 424, L. R. A. 1915 E, 1022, Ann. Cas. 1916 E. 276.

Washington Gas Light Co. v. *District of Columbia*, 161 U. S. 316, 40 L. Ed. 712, 16 S. Ct. 564, 568.

City of Des Moines v. *Des Moines Water Co.*, 188 Ia. 24, 175 N. W. 821.

Therefore, the petition for writ of certiorari filed herein should be dismissed.

WILLIAM L. WALKER,
MAX G. TOWLE,
ROBERT A. NELSON,
Counsel for Respondent,
C. Russell Mattson.

In The

Supreme Court of the United States

Number 310.

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

BRIEF IN ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR EIGHTH CIRCUIT.

OPINION BELOW.

The opinion below is now reported in advance sheets 174 F. (2d) 215.

JURISDICTION OF COURT.

The jurisdiction of this court cannot be invoked under Title 28, United States Code, Section 1254, and Rule 38, Subsection 5 (b) of the Revised Rules of the Supreme Court of the United States because the United States Court of Appeals for the Eighth Circuit cor-

rectly and properly arrived at its decision by applying the law of Nebraska applicable to the subject and it is immaterial that said decision may conflict with decisions of other United States Court of Appeals, which respondents specifically deny, and said decision in no manner conflicts with law of Nebraska applicable to the subject and in no manner can the decision be said to be a decision or an important question of local law but merely involves question of applying local law.

STATEMENT OF THE CASE.

Since the statement of the matter involved by the petitioner, is inaccurate in some respects and seriously lacking in some material respects, it is necessary for respondent, Mattson, to challenge the court's attention to other facts and evidence.

This is a petition for writ of certiorari by petitioner to review a judgment of United States Court of Appeals for Eighth Circuit which reversed, on appeal from United States District Court of Nebraska, Lincoln Division, a judgment for petitioner entered on a directed verdict (R10,189). The action was brought by C. Russell Mattson as administrator of the Estate of William Brehm, deceased, to recover damages for the death of William Brehm by the alleged wrongful act of the Central Electric & Gas Company under the death Statute of Nebraska (R2).

At the time of receiving the injuries from which he later died, William Brehm was employed as a custodian or janitor in the Capitol School Building in Lincoln, Nebraska. On December 19, 1945, while so employed, there was an explosion which blew him out

of the furnace room of the school building and inflicted bruises and burns upon him from which he later died (R24-28). The explosion was caused by escaping natural gas (R85). He is survived by his widow and three minor children (R135-138). It is plaintiff's claim that the explosion resulting in the death of William Brehm was caused by gas which escaped from the gas pipes serving the Capitol School Building, through the negligence of the Gas Company in that the company failed properly to inspect and keep in repair the gas pipes conveying the natural gas to the school building (R84,85).

Viewing the evidence in the light most favorable to plaintiff, the jury might reasonably have believed that about twenty-seven years prior to the time of the catastrophe causing the death of plaintiff's decedent, defendant's predecessor installed a gas service line connected with its gas line and extending from the street curb line to the Capitol School Building, in which building it installed a gas meter (R59-62,81,109, 128,167). Since that time defendant and its predecessor have used this service line for conveying its gas to the meter in the Capitol School. The Gas Company is a public company engaged in supplying and distributing natural gas to the inhabitants of the City of Lincoln, Nebraska. The school district paid the Gas Company for the material and labor in installing this service line, the material being selected by the Gas Company. The pipe was black iron or steel pipe (R117-120). The school district was a customer of the Gas Company and the gas supplied to the school building was passed through a meter belonging to the Gas Company as it was delivered to the school district. The

pipe used had a serviceable life of from ten to fifteen years (R123). From the time of its installation to the time of the explosion, this service pipe was not dug up and inspected, nor otherwise inspected, except that there was a superficial inspection of the service pipe made by the Gas Company once or twice in the spring of each year or along in the summertime. The inspection consisted of an examination of the grass or the top surface of the ground under which the pipe was laid. Repairs to the service lines, if any, were made by the Gas Company and under no circumstances would the Gas Company permit an independent plumber or any other person to make such repairs (R124-126, 131-133). The service line was laid under the school yard which was open ground, accessible at any point, so that the Gas Company had an opportunity to make any inspections or repairs desired. Investigation and inspection made subsequent to the explosion disclosed that portions of the service pipe had become rusted, corroded, decayed, porous and perforated with holes, which permitted the natural gas to escape so that it percolated, seeped and traveled to the coal bins of the Capitol School Building and accumulated in the coal basement and exploded, causing plaintiff's decedent's death (R67-71,88-97).

ARGUMENT.

I.

Petitioner's Specification of Error No. 1 has no Merit and Should be Overruled.

The Court of Appeals for the Eighth Circuit applied the rules of law in the cases of *Erie Railroad Co.* v.

Tompkins, supra, *Badger* v. *Hoidale,* (8 Cir.), supra, *Yoder* v. *Nu-Enamel Corp.* (8 Cir.) supra, *Hawks* v. *Hamil,* supra, which required the Court of Appeals and United States District Court in this case to apply the considered dicta and persuasive data, such as, compelling inferences or logical implications and other related adjudication and considered pronouncements of the Supreme Court of Nebraska on the subject involved; and in full compliance with this rule, the United States Court of Appeals applied the language in *Harms* v. *City of Beatrice,* supra, where the Supreme Court of Nebraska held the City of Beatrice liable for negligence to same extent as a private corporation engaged in the same business and in the course of the opinion the Court said:

> *"We do not think that the question of liability in this case can be determined from the nature of the contract between the city and the water consumer. The plaintiff was a member of the traveling public to whom a duty was owed by some one to maintain the water-works system in a reasonably safe condition. We are of the opinion that duty rests upon the city, irrespective of the terms of its contract with the consumer.*
>
> *"A city acts in its proprietary capacity when it engages in the operation of a water-works system and it is liable for negligence to the same extent as a private corporation engaged in the same business. The operation of a water-works system requires not only a pumping plant and a series of water mains, but it requires service lines to the property of the consumer as well. They all go to make up the distribution system. To say that the pumping plant and water mains alone make up the water-works system is but to fly into the face of the fact. Water is not delivered to the consumer*

when it arrives in the main in front of the consumer's property. It is delivered when it is made available for use.

"The fact that the consumer may be required to pay the costs of labor and materials in the installation of the service line does not seem to us to be controlling. Whether this be the means of fixing the connection charge or whether the consumer actually becomes the owner, the fact remains that it is a part of the water-works system which the city is duty bound to maintain in a reasonably safe condition for the protection of the public, irrespective of its contract with the adjoining property owner. While there may be a question whether liability of the consumer to the city exists by virtue of agreement among themselves, a question on which we express no opinion, it seems clear that the city cannot delegate the duty it owes the public to maintain the water-works system in a safe condition.

"The situation from a practical standpoint calls for the same conclusion. It is the city which reads the meters and obtains first hand knowledge of the condition of the service line. The consumer, with little knowledge of the business, relies upon the city in its capacity as operator of the utility to see that water is available for use. This is a duty the city assumes when it undertakes to render the service" (*Italics ours*).

The cases of *State* v. *Marsh*, 107 Neb. 637, 187 N. W. 87; *City of Lincoln* v. *Steffensmeyer*, 134 Neb. 613, 279 N. W. 272; *Yoder* v. *Nu-Enamel Corp.*, 140 Neb. 585, 300 N. W. 840, are no wise in point in support of the contention of petitioner, but to the contrary, clearly support the rule contended for by respondent and which was applied by the United States Court of Appeals in rendering the above decision on April 11,

1949, and taken from *Badger* v. *Hoidale,* (8 Cir.) supra; *Yoder* v. *Nu-Enamel Corp.,* (8 Cir.), supra; *Hawks* v. *Hamil,* U. S. supra; *Erie R. Co.* v. *Tompkins,* U. S. supra, which is that "considered dictum of the State Court should not be ignored where a federal court is attempting to construe or ascertain the meaning of the local law whether it be the Statute or the State Constitution." This rule authorizes the United States Court of Appeals to apply considered dictum which is defined as "a judicial opinion expressed by the writer on a point that is not necessarily raised and not involved in the case, on a point on which the judicial mind was not directed to the precise question necessary to be determined to fix the rights of the parties, constitutes dictum," *State* v. *Love,* 89 Neb. 149, 131 N. W. 196.

Petitioner's contention that what United States Court of Appeals for Eighth Circuit has decided is in conflict with decisions of other United States Court of Appeals from other circuits is immaterial in the language of this court in *Ragan* v. *Merchant's Transfer & Warehouse Co.,* supra, when the court said:

> "A decision of a court of appeals as to the law of the State included within the circuit will ordinarily be accepted and left undisturbed by the Supreme Court of the United States."

In *Proper* v. *Clark,* supra, this court said:

> "In dealing with issues of state law, the Supreme Court of the United States is hesitant to overrule decisions by Federal Courts skilled in the law of particular States unless their conclusions are shown to be unreasonable."

In *Huddleston* v. *Dwyer*, supra, this court said:

> "The Supreme Court of the United States will ordinarily accept, and therefore will not review save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts; and where such questions may be conveniently first decided by the court whose judgment is to be reviewed, the Supreme Court will not ordinarily decide them in the first instant."

In *Busby* v. *Electric Utilities Employees' Union*, supra, this court said:

> "Only in exceptional cases will the Supreme Court of the United States review a determination of a question of local law of the District of Columbia by the District of Columbia Court of Appeals."

In *MacGregor* v. *State Mut. Life Assur. Co.*, supra, this court said:

> "In the absence of a decision of any state court on the point the Supreme Court of the United States will leave undisturbed an interpretation placed upon a state statute by a local Federal district judge of long experience and by three judges of the Federal Circuit Court of Appeals whose circuit includes such state."

In *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, supra, this court said:

> "The proper function of the Federal Court, in a case governed by state law, is to ascertain what the state law is, not what it ought to be."

In *Palmer* v. *Hoffman*, supra, this court said:

> "Rulings of a lower Federal court applying local law will not be set aside by the Supreme Court except on a plain showing of error."

In re Woods, supra, this court said:

> "Whether the law of Minesota that a judgment of dismissal is not a bar to a second suit for the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment, was properly applied on the trial of a case, are not questions of such gravity and importance as to require the review by this court of the conclusions of the Circuit Court of Appeals in reference to them."

In *Ruhlin* v. *New York Life Ins. Co.,* supra, this court said:

> "As to questions controlled by state law, conflict among Federal Circuit Courts of Appeals is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

Since the United States Court of Appeals decision applied the Nebraska law, and since it is immaterial whether other circuits may have pronounced different rules on different state and local law, the petition for writ of certiorari is not well taken and is without merit and should be dismissed.

II.

There is no Merit in Petitioner's Specification of Error Number 2.

The rule laid down by the United States Court of Appeals in its decision is a cogent and sound applica-

tion of the considered dicta of the decision of the Supreme Court of Nebraska. This opinion was written by Gardner, Chief Judge, who has had many years of experience in application of the decisions of Supreme Court of Nebraska in appealed cases to his court from the United States District Courts from Nebraska and Woodrough, Appeals Judge, who decided with Gardner, Chief Judge, in the majority opinion, was a practicing attorney in Omaha for many years, before serving as Judge of United States District Court of Nebraska, Omaha Division, and has during the time he has sat on the United States Court of Appeals applied and decided questions of local law involving decisions of the Supreme Court of Nebraska and was at the time that this case was presented to their court familiar with said Nebraska decisions which are here relied upon to sustain the accurate and correct rule sustained by the considered dicta of the Nebraska decisions creating the duty of petitioner to inspect, repair, supervise and maintain its gas service lines which it used to deliver its natural gas to customers and acquired knowledge by having an opportunity to exercise reasonable diligence to acquire knowledge, is equivalent to knowledge and petitioner was under duty to use care for which knowledge is necessary cannot avoid because of voluntary ignorance; the petitioner had constructive notice which is just as effective as actual notice.

The oral opinion delivered by the United States District Court at the time it directed a verdict against respondent (R145) and the written memorandum filed at the time the motion for a new trial was overruled (R15,

19) persuasively and conclusively indicated that it did apply the decisions of the Supreme Court of Nebraska under rule of the United States Court of Appeals for Eighth Circuit that "considered dicta and persuasive data, such as, compelling inferences or logical implications and other related adjudications and considered pronouncements by the Supreme Court of Nebraska on the subject," must be applied by the United States District and Court of Appeals.

III.

There is no Merit in Petitioner's Specification of Error Number 3.

It is difficult to justify the statement in petitioner's brief that states, "concededly, the general rule is that suppliers of natural gas have no duty of inspection or maintenance of private pipes or appliances in absence of duty having been undertaken, or actual notice or knowledge of the defective condition thereof;" while said statement is not decisive of the issues and points involved in this petition for writ of certiorari, the weight and majority of the jurisdiction do not support the rule announced under the evidence and facts of the case at bar. Most, if not all, of the jurisdictions and courts of appeal would sustain the decision of April 11, 1949, of the United States Court of Appeals and said rule stated is not applicable because no other rules can be applied other than those which were applied by the United States Court of Appeals.

IV.

There is no Merit in the Specification of Error Number 4.

The conclusion of the United States Court of Appeals in its opinion, held that:

> "In their facts these cases are so similar to the instant case that it seems to us that in principle they cannot be distinguished. The Company, as has been observed, furnished the material and laid these pipes and used them for the transmission of its gas to its meter in the school building. The natural gas which the Company was transmitting through this pipe was of highly dangerous character and it owed a duty to the public to exercise a degree of care commensurate with the danger involved in the transaction of its business. It knew when this gas line was laid and it was its duty to know what the probable life of the gas pipe would be in the soil where it was laid. While the defendant did not have actual notice that gas was escaping from this perforated pipe, it did know that gas would escape from a perforated pipe and it was charged with knowledge, at least the jury might have so found, that this pipe had probably become perforated. It knew that the pipe had been in the ground for more than twenty-five years and it, rather than the plaintiff's decedent, should have known what the condition of the pipe was and the danger arising from its deteriorated condition. Under the circumstances disclosed by the record the jury might properly have charged the Company with constructive notice and if so that notice is just as effective as actual notice. While the foundation of liability for negligence is knowledge, in law an opportunity by the exercise of reasonable diligence to acquire knowledge is equivalent to knowledge,

and one under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance. The Company had the sole right to make repairs, and according to the testimony of its manager it would under no circumstances permit an independent plumber or any other person to make repairs to its service line. But Brehm was not the owner of the property being served, nor the consumer of natural gas, but was one of the public who as such was entitled to protection.

"Not only was there evidence to warrant the jury in finding the defendant negligent because it was charged with notice as to the defective condition of this service pipe, but the evidence warranted the jury in believing that it made a superficial inspection twice a year."

In the Nebraska case of *Hollenbeck* v. *Guardian Natl. Life Insurance Company*, 144 Neb. 684, 14 N. W. (2d) 330, the court said:

"Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry."

To same effect is Nebraska case of *Talich* v. *Marvel*, 115 Neb. 255, 212 N. W. 540.

These cases do not support statement made by petitioner but on the contrary hold that petitioner had knowledge that after 27 years a 1¼ inch black iron or steel pipe which had a life from 10 to 15 years because they assumed each year to make two superficial surface ground inspections by observing whether the grass and vegetation was dying over or around service line through which petitioner delivered its natural gas from its main to its meter in the Capitol School Building.

In the case of *Harms* v. *City of Beatrice*, supra, the court said:

> "It is the city which reads the meters and obtains first hand knowledge of the condition of the service line. The consumer, with little knowledge of the business, relies upon the city in its capacity as operator of the utility to see that water is available for use. This is a duty the city assumes when it undertakes to render the service."

In the case of *Fonda* v. *Northwestern Public Service Co.*, supra, 134 Neb. 430, 278 N. W. 836, the court said:

> " 'When a gas company engages in the distribution of natural gas and the installation and inspection of its equipment, it is incumbent on such company to exercise the high degree of care and diligence required in the handling of a dangerous commodity, and, if negligent, it is liable therefor.'
>
> "In 28 C. J. 591, 592, 593, it is said: 'While no absolute standard of duty can be prescribed, it may be said, in general terms, that every reasonable precaution suggested by experience and the known danger of the escape of gas ought to be taken. This requires, in the case of a gas company, * * * that it shall maintain an efficient system of inspection, oversight, and superintendence. * * * A gas company must use due and reasonable care in the inspection of its pipes, to insure reasonable care in the inspection of its pipes, to insure reasonable promptness in the discovery of leaks that may occur from defects in or deterioration of pipes and valves, from careless or wrongful meddling with its works on the part of others.' "

To same effect is *Fonda* v. *Northwestern Public Service Co.*, 138 Neb. 262, 292 N. W. 712; *Tarkington* v.

Northwestern Public Service Co., 138 Neb. 278, 292 N. W. 720.

In *Clough* v. *North Central Gas Co.*, 150 Neb. 418, 34 N. W. (2d) 862, this court said:

> "Natural gas belongs to the company which dispenses it until it is sold through the meter to the consumer.
>
> "A gas company owes duty to general public to so operate its business and maintain its pipes as to prevent the escape of gas in such quantities as to become dangerous to life or property.
>
> "Where a gas company knows or should know that a service line owned by a customer is corroded to such an extent as to permit gas to escape, gas company must either cause gas line to be repaired by customer, or have gas shut off at street where the main is that furnishes the gas to the customer, in order to avoid the danger which might result."

After the United States Court of Appeals quoted evidence of petitioner's manager on casual inspection of surface ground over the service line twice a year, the court said in its opinion:

> "* * * we think this was some evidence that the defendant asserted the exclusive right to make repairs on this service pipe and that it and it alone had dominion over this pipe. It would tolerate no interference with this pipe even by the customer, and this, doubtless, because the pipe contained the deadly gas of the defendant. In these circumstances it made the inspection referred to. Having so undertaken to make inspection and having denied the right to any other person to make repairs on this pipe, it was its duty

> to exercise proper care and skill in so doing, and whether it had done so was, we think, a question of fact to be determined by the jury." (R180)

Petitioner's brief cites Nebraska cases of *Gates* v. *City of North Platte,* 126 Neb. 785, 254 N. W. 418; *City of Omaha* v. *Kochem,* 74 Neb. 718, 105 N. W. 182; *Struble* v. *Village of Dewitt,* 81 Neb. 504, 116 N. W. 154; *City of Lincoln* v. *Pirner,* 59 Neb. 634, 81 N. W. 846; *Hashenberger* v. *City of Schuyler,* 115 Neb. 639; *Knies* v. *Lang,* 116 Neb. 387. All of these cases except the latter, either were brought to recover injuries for tort of the city or village in regard to defects in streets, sidewalks and manhole covers over sewers on parkways while the city or village was functioning in its governmental capacity and not in its proprietory capacity as it was in the *Harms* v. *City of Beatrice,* supra, when it was acting as a utility in the dispensing of water; and there have been statutes in existence in the State of Nebraska such as Section 15-843, R. S. 1943, which provide that actual written notice must be given the city five days before the injury occurred that such defect existed in the public way or sidewalk; and statutes such as Sections 16-730 and 17-716, R. S. 1943, that no recovery may be had unless actual notice is given city as to injury, damage, place of happening and amount claimed by filing claim with city clerk within 30 days from date of injury; and in addition most of said cities and villages have ordinances to the same effect. With this further additional information, it is obvious that said cases involving functions of city and village in its governmental capacity as to streets, sidewalks and sewers are not analagous and applicable to the case at bar, and must be

distinguished from the *Harms* v. *City of Beatrice*, supra, case where the city was acting in its proprietor capacity in dispensing water for profit to customers and stood in the same position as a public utility would be or as the petitioner dispensing natural gas to the Capitol School Building in Lincoln is in the case at bar; and under such circumstances as is said by the court in *Harms* v. *City of Beatrice*, supra, "notice is not required as a condition precedent to liability."

The non-liability in the above cases against the cities or villages is predicated upon the failure to give one or the other notices required; and further that in each case it is not shown that the city in its governmental capacity had no notice whatsoever of the condition; but the petitioner is a public utility in business for profit and is not entitled to be clothed with protection such as a governing body of a city functioning in its governmental capacity; the petitioner is in the identical position the city would be if functioning in its proprietor capacity as in the *Harms* v. *City of Beatrice*, supra, where it was charged with a duty to use diligence in inspection, supervision, maintenance and repair and be subjected to liability for its negligence in performing such imposed duty, and, of course, these cases didn't involve highly dangerous natural gas and the care required in its dispensation thereof. The case of *Knies* v. *Lang*, supra, is not applicable to the case at bar because the board that fell from the building and injured plaintiff in the case was blown from the building by a high wind; the board was not a dangerous instrumentality as highly dangerous as natural gas that was dispensed through the service line in question in the case at bar where the facts

show that no intervention of any kind occurred, either human or otherwise, that caused the service line with a life of 10 to 15 years, to become decayed, rotted, perforated and full of holes as a result of delivering natural gas through the same for a period of 27 years or longer. The United States Court of Appeals so aptly said in its opinion that:

> "Under the Nebraska decisions the Gas Company could not delegate the duty it owed to the public to exercise proper care to maintain its gas system in safe condition, but it had the continuing duty to exercise proper care to prevent injury from escaping gas. Hence, the mere fact that the service pipe was paid for and possibly was the property of the consumer, did not shift the duty of exercising proper care. The gas in the service pipe, as before noted, was that of the defendant, and as long as it remained its property it was under the duty of using proper care to protect the public from injury caused by the dangerous propensities of that property. A proper regard for the safety of the public would seem to forbid the owner of such dangerous agency to avoid liability for damage by simply housing such property in a container belonging to some one else, particularly when the owner of such dangerous agency knows, or is charged with knowledge, that the housing or container facilities are in a decayed, dilapidated and deteriorated condition. The agents and employees of the Company are presumably skilled in the business of their employer. They knew, or were presumed to know, the probable life or durability of the materials used, where the pipes have been in use as long as the pipes in the instant case, the jury might reasonably find that the Company was charged with notice of their condition."

CONCLUSION.

Therefore, because of reasons above given, the judgment of the Court of Appeals of Eighth Circuit made and entered on April 11, 1949, by Gardner, Chief Judge and Woodrough, Appeals Judge (R189), is correct on application of the Nebraska law and considered dicta of the decisions of Supreme Court of Nebraska and related adjudication on the subject on evidence and facts of the case when it reversed the United States District Court order, made and entered on December 5, 1947, sustaining the motion of petitioner for a directed verdict at close of respondent's evidence and direction of jury to return a verdict, and entry of a judgment thereon dismissing respondent's complaint and cause of action with prejudice at his costs (R157), and trial court's order of December 29, 1947, overruling respondent's motion for a new trial (R19) and the judgment of the Court of Appeals of Eight Circuit should be affirmed by denying petitioner's petition for writ of certiorari.

Respectfully submitted,

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